

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555-JMP

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In the Matter of:

LEHMAN BROTHERS HOLDINGS INC.,

Debtor.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

November 5, 2009

2:10 PM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

1 HEARING re Status Conference

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ALSO PRESENT TELEPHONICALLY:

MEGHAN S. MICHELS, Creditor, The Baupost Group

MITCHELL SOCKETT, Creditor King Street Capital Management

1 P R O C E E D I N G S

2 THE COURT: Be seated, please.

3 (Pause)

4 MR. CAPUTO: Good afternoon, Your Honor. Ken Caputo  
5 on behalf of the Securities Investor Protection Corporation.

6 THE COURT: Good afternoon.

7 MR. CAPUTO: Thanks for taking the time today.

8 We're here to give you a very brief update on the  
9 claims process --

10 THE COURT: Okay.

11 MR. CAPUTO: -- and the status of it in the SIPA  
12 liquidation of Lehman Brothers, Inc.

13 You may recall, Your Honor, that on November 7th of  
14 2008 you had entered an order specifying procedures that the  
15 trustee could you use to determine claims, resolve claims,  
16 etcetera. And the trustee and SIPC have been working on  
17 implementing the terms and conditions of that order and we've  
18 made terrific progress and we're here to tell you a little bit  
19 about that progress and some of the obstacles that we face in  
20 going forward.

21 We had sent a letter to the Court dated October 14th  
22 of 2009 which sets forth some numbers which provide some sort  
23 of barometer on where the estate is. And in that letter we had  
24 told you that there were approximately 594 objections relating  
25 to 928 customer claims and that involved about 7,041 claims

1 that had been denied or reclassified. Those numbers are  
2 updated, some of which appear on the chart. But we now have  
3 received up through 627 objections to claims that relate to 965  
4 customer claims and those are out of 8,356 determinations that  
5 have been denied. So we've made large progress in determining  
6 a significant number of claims just since the letter has been  
7 written to the Court over the last couple of weeks. There are  
8 a lot of objections, that's really the gist of what we're here  
9 to talk about, for the most part.

10 Attached to our letter was a chart that set forth a  
11 number of categories of objections and listed them and we have  
12 an update to that, Your Honor. And if it pleases the Court I'd  
13 like to hand one up for you.

14 THE COURT: That would be fine. Thank you.

15 (Pause)

16 THE COURT: This is an example of what's on the easel  
17 as well?

18 MR. CAPUTO: Exactly.

19 THE COURT: Okay.

20 MR. CAPUTO: And these are the categories of  
21 objections that we have received. Without getting into any of  
22 the specifics of the issues or the numbers, and in a minute  
23 you're going to hear from Jim Kobak representing the trustee  
24 who's going to be able to tell you a little bit more about the  
25 specific numbers. But as an overview, what we have done thus



1 far and what we intend to continue to do is to address this  
2 case much like we've addressed SIPA cases in jurisdictions  
3 throughout the country and in many of the cases that have come  
4 before judges in this district.

5 And part of that process is, once you have an  
6 objection and once you have an issue that you know needs to be  
7 determined and then resolved, we tend to -- we want to reach  
8 out to those claimants and we've done so here, repeatedly, is  
9 reach out to the objector. Try to get your hands around what  
10 the actual dispute is all about, what the facts are, what the  
11 law is, what the issues are and first see if you can reach  
12 common ground. We've been successful thus far in having more  
13 than thirty objections, that have been filed, withdrawn. So  
14 that process we hope would continue and we're able to make  
15 progress on having objections withdrawn, so be it, that's  
16 terrific.

17 There will be a number of them, however, that that's  
18 just not going to happen. There are going to be real issues  
19 and significant issues that will have to come before the Court  
20 for resolution.

21 Recently we filed, the trustee filed, a motion for  
22 resolution on an agreed order basis of a dispute which we think  
23 serves as a bit of a model for what we would like to do going  
24 forward. And in that dispute the parties have submitted fairly  
25 concise lists with stipulated facts and on that basis the

1 parties have set forth what they would like to do on a briefing  
2 schedule. And then they, assuming the Court enters the order,  
3 the briefs would be filed and the issue would be ripe for  
4 resolution by the Court.

5 So many of the disputes that we have, whether it's on  
6 TBA's or repos or any of the categories that you see on the  
7 chart, what we'll intend to do is to try to find a resolution.  
8 Where we can't find a resolution, get our hands around it as  
9 litigants without affecting the Court. And then, and only  
10 then, coming before the Court via motion and at the convenience  
11 of the Court set it down for hearing or other types of  
12 resolution as may be necessary.

13 So that's generally the process that we envision.  
14 That's what worked well in SIPA cases in many jurisdictions.  
15 What we're really trying to alert the Court to, perhaps, is the  
16 fact that we do have a lot of objections. And some of these  
17 objections involve significant dollars and they're significant  
18 issues to the claimants. You're talking issues in the tens if  
19 not hundreds of millions of dollars or more. So they're not  
20 going to go away, is what we're trying to tell you. And we're  
21 going to have to get to the point where we resolve them. So we  
22 recognize that the Court has a very busy calendar, so we intend  
23 to work with your clerks and your calendar clerk and try to get  
24 these scheduled up in a way that best fits the Court's  
25 schedule.

1 THE COURT: Let me understand what it is that you  
2 envision happening, assuming you have a group of objections  
3 that fall within a particular category, and we're talking about  
4 large numbers of claims within that category. Let's just pick  
5 one of example, a TBA has 360.

6 MR. CAPUTO: Right.

7 THE COURT: Four more then existed on the 14th of  
8 October when you sent me the letter. Let's just use that as a  
9 round number. What do you do and how do you make that an  
10 orderly process and to what extent is alternative dispute  
11 resolution techniques that have been identified for purposes of  
12 the LBHI case techniques that might be suitable here and to  
13 what extent is that not suitable?

14 MR. CAPUTO: The first thing we do is make contact  
15 with each of the objectors, their counsel, and try to gauge  
16 essentially what the issues are and what their inclination is  
17 to be in the lead of resolution of that issue or as part of a  
18 group that is willing to go along with the lead group. With  
19 that issue in particular, because of its magnitude, I think  
20 we're going to have to spend a fair amount of time just getting  
21 our hands around all of the different parties. But we will be  
22 reaching out to them absent the court process and trying to  
23 gauge from each of the parties what their issues are and  
24 whether or not we can, at all, get to a point where we  
25 concisely have facts and then issues or matters of law for

1 resolution.

2           It may be, with that particular class because it's so  
3 large, that there are a series of sub issues or sub  
4 determinations that need to be remedied. There may be a  
5 certain type or different category within the TBA class. We  
6 don't know that yet but that may turn out to be the case as we  
7 reach out to these parties, where you have lesser numbers.  
8 Where you have, for example, thirty-eight for lack of  
9 information or, you know, I can tell you that there have been a  
10 number of claimants who have filed claims for their LBHI bond  
11 that they want back or losses in their account after 9/19, that  
12 kind of thing. What we intend to do, we reach out to them; we  
13 collectivize that as best we can.

14           As for the alternative dispute resolution process, it  
15 presents a bit of a quandary for us as a program going forward.  
16 Can't rule it out because where it may apply it may be possible  
17 to work it in. But for the most part, the resolutions of  
18 issues here are issues of law, matters of law under the  
19 Securities Investor Protection Act and it's applicability and  
20 sections of the Code and whether they apply in SIPA or not.

21           So it may be very difficult to have a mediator or  
22 arbitrator come before and try to work out a solution that  
23 would be amenable to 360 parties or maybe 135 parties in the  
24 second category. I can't say it would not be possible,  
25 standing here today, I think it may be. But what we've seen,

1 of course we've never seen this kind of magnitude in a SIPA  
2 case, but what we've seen in other issues it comes down to a  
3 determination that needs to be made by a court of law. And  
4 what the importance of that is, seen by the fact that the  
5 determination by the Court, the ultimate determination of the  
6 legal issue provides clarity for, among others, the regulatory  
7 process, investors, customers and it helps each of those  
8 parties down the road gauge better their risk, their appetite  
9 for risk, their ability to manage their affairs and also tells  
10 them what kind of protections are available to them ultimately  
11 down the road.

12 So we may be able to -- we have mediated disputes in  
13 the past within the SIPA context, we have been successful doing  
14 that. But here it may come down to a number of them requiring  
15 the Court to determine what the law is. So I think we're going  
16 to be flexible and we'll certainly look to work with the Court  
17 to the maximum extent we can on that and see if we can make  
18 some headway.

19 So I'm not ruling anything out. Of course I wouldn't  
20 categorically say we can't do that but it may prove difficult  
21 for some of these issues down the road.

22 THE COURT: Okay.

23 MR. CAPUTO: Thank you.

24 MR. KOBAK: Good afternoon, Your Honor. James Kobak,  
25 Hughes Hubbard & Reed for the Trustee.

1 I just wanted to focus on some of the individual  
2 categories. Although there are a large number of claims it's  
3 not quite as daunting, perhaps, as appears. And the TBA's for  
4 instance, although they're 360 pending objections and there  
5 probably will be more in the future, the great majority of  
6 those are really accounted for by clients of three or four  
7 entities; BlackRock, Pimco, Morgan Stanley and Galliard. And  
8 we've already talked to some of those people, so I think as a  
9 practical matter we see this as involving one or two overriding  
10 legal issues. And I think we should be able to work with some  
11 of those parties to get this issue teed up.

12 If it were to be determined that there were customer  
13 claims, there might perhaps be some factual issues that would  
14 then have to be dealt with that we could either resolve or what  
15 have you. But I think that the basic overriding legal  
16 question, is this a customer transaction or not, is it covered  
17 by SIPC is essentially a legal issue and I think they'll be  
18 three or four.

19 THE COURT: Let me stop you for a second just to  
20 understand how this issue gets to this point of being a number  
21 on a chart.

22 I take it that either the trustee or SIPC makes a  
23 determination that a particular claim is not an allowed  
24 customer claim, is that right?

25 MR. KOBAC: That's correct. We send a letter -- this

1 is all pursuant to the procedures in Your Honor's November 7th  
2 order.

3 THE COURT: Right. Which party is making that  
4 decision in the case of these claims? And I'm just using the  
5 TBA as an example.

6 MR. KOBAK: Well actually the trustee and his  
7 professionals review the claim, we have an extensive system for  
8 doing that, reconcile the amounts and so forth, determine  
9 what's on the books and records, whether it corresponds with  
10 the claim and then we make a determination. Those  
11 determinations are also reviewed by SIPC and then a letter goes  
12 out. Technically the letter goes out from the trustee; it's  
13 the trustee's determination. But in fact SIPC is involved in  
14 the process.

15 THE COURT: It's a consultation.

16 MR. KOBAK: That's correct.

17 THE COURT: It's a consultation with SIPC.

18 MR. KOBAK: That's correct.

19 THE COURT: And I take it that the trustee, in  
20 consultation with SIPC, has determined that in the case of,  
21 again this category which is just by way of example, that at  
22 least at this point 360 claims that have been made in this  
23 category are to be disallowed because they do not constitute,  
24 in the determination of the trustee, customer claims, is that  
25 correct?

1 MR. KOBAK: That's correct.

2 THE COURT: But they all fall into the same general  
3 category of type of claim.

4 MR. KOBAK: That's correct.

5 THE COURT: Is there any guidance in case law or  
6 regulatory authority or administrative authority that supports  
7 the determination? Is there anything in the statute that  
8 supports the determination or is this simply a judgment call,  
9 an informed judgment call by the trustee?

10 MR. KOBAK: It's our interpret -- I mean, we do think  
11 it's an informed judgment call. I really don't want to be in  
12 the position, because I don't think it's fair to claimants, so  
13 I'm, kind of, putting forth what our argument is.

14 THE COURT: I don't want to know what your argument  
15 is. I'm just trying to understand whether or not it's a simple  
16 question because you're pointing to authority and say, well  
17 this doesn't qualify as a customer claim under the authority of  
18 the XYZ case or under the authority of what we did in another  
19 similar case. Or is this rather something which is being  
20 fabricated, I mean that not in a negative way, in the context  
21 of this case because of the more sophisticated nature of the  
22 kinds of claims being presented?

23 MR. KOBAK: I think some of the specific claims have  
24 not been litigated frequently. Repos, for instance, there is  
25 some case law on but it's only one or two cases. But it's --



1 our position is basically based on what we think is very clear  
2 statutory interpretation, legislative history, what case law  
3 there is. So it's not really a fabricated position but some of  
4 these questions --

5 THE COURT: When I used the term fabricated --

6 MR. KOBAK: No, I --

7 THE COURT: -- I didn't mean that in the sense that it  
8 might be used informally. I meant constructed or put together  
9 in the context of this particular case.

10 MR. KOBAK: I don't think it's completely  
11 unprecedented but on most of these points there is not a lot of  
12 precedent directly on point out there.

13 THE COURT: And in the objections that have been  
14 filed, are the parties who are taking issue with the position  
15 that you have articulated, presenting you with authority of one  
16 sort or another to suggest that you're just plain wrong?

17 MR. KOBAK: Yes, in some cases they are. Some cases  
18 the objections are fairly short and cryptic but in the case of  
19 some of these sophisticated entities that have a lot of clients  
20 with TBA claims, they have in fact set forth things, kind of,  
21 in the nature of the summary of argument and brief, sometimes  
22 even citing what they think is pertinent authority. And we  
23 have looked at that very carefully.

24 THE COURT: Okay. So this is an example, then, of a  
25 kind of claim that may lend itself to a summary judgment type

1 presentation?

2 MR. KOBAK: That's correct. The shorts position,  
3 which Mr. Caputo alluded to, we've already, as he mentioned,  
4 worked out a stipulation of facts with an entity known as Fifth  
5 Third (ph.). And we think that tees up the -- what we think is  
6 the controlling legal issue.

7 So far there's only been one person who's objected to  
8 short position but there will be some hedge funds that take a  
9 similar position. And it will be up to them but I would think  
10 that they may well want to come in and be involved in some of  
11 the briefing and so forth on this issue. Because again, we  
12 think there's overriding legal issue as to what the  
13 determinative date is for SIPA purposes.

14 THE COURT: All right. Well, what's the vehicle,  
15 then, for a summary judgment that would be generally applicable  
16 to, in this case, the TBA claims, 360 similarly situated  
17 parties?

18 MR. KOBAK: Well, I think with the TBAs what we'd be  
19 inclined to do, and of course it takes two to tango in a sense,  
20 but I think -- we have had some preliminary discussions. I  
21 think we would try to come up with some kind of omnibus motion  
22 that would cover, maybe not all of them but at least a  
23 substantial number, and essentially get agreement as to what  
24 the basic underlying facts are, which I think would be largely  
25 undisputed for purposes of determining the overriding legal

1 issues and present it. We've done that in other SIPA cases in  
2 the past when there have been similar types of issues as to  
3 whether a certain transaction or certain kind of relationship  
4 qualifies for customer treatment or not.

5 THE COURT: In terms of process, it's apparent that  
6 the total number of pending objections, which is as of today  
7 627, is up by thirty-three from the number that -- thirty-four  
8 from the number that existed as of a few weeks ago. Some  
9 objections have been withdrawn but on a moving target basis is  
10 there a projection as to how many overall objections we're  
11 going to need to be dealing with in the life of this case?

12 MR. KOBAK: There will be more and there are, I think,  
13 approximately -- the way the order works, when we send a letter  
14 of determination the claimant has thirty days to file an  
15 objection or not. If they don't object the objection is final.  
16 In our experience maybe eighty, ninety percent of the time  
17 there isn't an objection but the rest of the time there may be.  
18 So I think they're approximately a little over a 1,000 letters  
19 as to which the thirty day period hasn't run, so there would be  
20 some more objections on those. And there are another 1,000 to  
21 2,000 claims that haven't been determined yet and many of those  
22 will probably be denied and there probably will be further  
23 objections. But I don't think we've been able to really come  
24 up with any kind of precision with a number as to whether it'll  
25 be 200 more or 300 more or 400 more. There will be more.

1 I do think we are in touch with many of the  
2 categories, the empty account category which means the account  
3 on the debtor's books and records shows no activity in the  
4 account and nothing in the account; lack of information where  
5 it's hard to understand what the claim is even for. Once or  
6 twice, for instance, allowed amount there's not any dispute the  
7 claim's allowed. I think there's just a very minor dispute as  
8 to the amount. We've been in touch with a lot of these people  
9 so I think a number of those will get withdrawn. But there  
10 undoubtedly will be a very substantial number just given the  
11 great number of customers that we're dealing with.

12 THE COURT: All right. Well, what do you propose at  
13 this point?

14 MR. KOBAK: I think our objective coming here today  
15 was simply to inform Your Honor that there would be a  
16 substantial number of claims. There already have been a lot of  
17 claims, as you know, filed on the docket. But that we do have  
18 an approach of grouping them together and dealing with them in  
19 an efficient way, in a way which we hope will be efficient in  
20 terms of Your Honor's calendar.

21 THE COURT: I hope so too. So this is really a  
22 warning to me that my workload is going to increase sometime  
23 over the next six months?

24 MR. KOBAK: Unfortunately yes, Your Honor. Although  
25 we'll try to keep that to a minimum. We'll try to keep the

1 numbers of objections that come before you, at least the  
2 numbers on the discrete matters that come before you to a  
3 minimum and try to handle them in the most efficient way  
4 possible.

5 We've found many of the claimants, actually even  
6 though we may have substantial differences as to the ultimate  
7 legal question, fairly reasonable to deal with. Many of them  
8 also have an objective of having these decided efficiently and  
9 without having to spend a lot of time in discovery and arguing  
10 about facts that may not have proved to be relevant.

11 THE COURT: Let me ask you a case administration  
12 question, unrelated to the specifics of the claim types or the  
13 issues that might be presented. Is it your expectation,  
14 notwithstanding what may be the very good working rapport that  
15 you have with some of your adversaries, that it will be  
16 necessary to set up some additional calendar time specific to  
17 the SIPC case to deal with this question? In other words, we  
18 have a pattern in the LBHI and LBI cases of shared omnibus  
19 hearing dates with shared agendas in which, for the most part,  
20 the LBI case has been, in relative terms, a less time consuming  
21 portion of omnibus days. Is it your expectation that we will  
22 need court time just for this on a separate day in certain  
23 months to be identified in the future?

24 MR. KOBAK: I don't know if it's absolutely necessary.  
25 I think it would be very helpful. I think it would make a lot

1 of sense because there will be issues about interpretation of  
2 SIPA that are fairly unique to our case. And I think there is  
3 a significant -- and some of those omnibus day calendars I know  
4 get rather lengthy already. So I think from our perspective  
5 that would seem to me to be a very salutary approach.

6 THE COURT: It appears to me that that would be  
7 desirable. And even if it turns out that some days are  
8 reserved and you only use a few hours on a day that's been set  
9 aside, it's probably preferable, given the number of people who  
10 may be physically present or on the phone to deal with these  
11 issues, that we identify separate LBI objection issues days,  
12 and I'm not sure what the right label is for it but you get the  
13 idea.

14 MR. KOBAK: Yes. No, I think that would be an  
15 excellent suggestion, Your Honor.

16 THE COURT: Okay. Now when do you think you're going  
17 to need this time?

18 MR. KOBAK: The Fifth Third, I think the schedule is  
19 the first brief will be due December 1st. So we anticipate  
20 that being ripe for coming before Your Honor sometime after the  
21 first of the year. And I think we'd probably be talking about  
22 after the first of the year, really for all these things.

23 MR. CAPUTO: The reply dates on that, Your Honor, are  
24 January 6th. So sometime after that it may be fully submitted  
25 and then it would come pursuant to that separate date that you

1 may set aside on that single issue. So that's not until  
2 January on that issue.

3 THE COURT: All right. Well --

4 MR. CAPUTO: And that's the first.

5 THE COURT: My suggestion is, if you think it would be  
6 useful to identify in advance certain dates in 2010 starting in  
7 January that will be designated for purposes of dealing with  
8 claims objections or issues relating to claims objections in  
9 the SIPA liquidation portion of the Lehman case, that we do  
10 that sooner rather than later. And that you think together  
11 with your various colleagues who need to prepared for this and  
12 perhaps some leading representatives of claimants, to come up  
13 with a schedule on a month-by-month basis that makes sense.  
14 And if you can come up with some suggested dates or weeks that  
15 would be useful, and contact my courtroom deputy and we can see  
16 if we can accommodate you consistent with my other obligations.  
17 It may be that we will need a chambers' conference just for  
18 purposes of working out dates that make sense and fine tuning  
19 the schedule.

20 MR. KOBAK: I understand, Your Honor. And that's fine  
21 with us. I think that's an excellent suggestion. I think that  
22 will help move this along as efficiently as possible.

23 THE COURT: Okay. Now, are there any other issues,  
24 other than scheduling, that need to be addressed now?

25 MR. KOBAK: Not at this time, Your Honor.

1 THE COURT: Is there anything else that you wish to  
2 say at this point?

3 MR. KOBAK: No, Your Honor.

4 THE COURT: Is there anything that anyone who has  
5 heard this wishes to say at this point? Apparently there is  
6 one person who is taking that bait.

7 MR. MCDONALD: Good afternoon, Your Honor. Hugh  
8 McDonald with Sonnenschein Nath & Rosenthal on behalf of Hudson  
9 City Savings Bank.

10 Your Honor, my client falls into the repurchase  
11 agreement category here. And my client has received the letter  
12 notice. We have timely responded with an objection setting  
13 forth, briefly, the basis of our objection, primarily this is  
14 an assault on the level (ph.) line of case law by SIPC and the  
15 trustee.

16 We understand from Your Honor's comments that you're  
17 looking to position these things for what is akin to a summary  
18 judgment resolution at some ultimate point. But we understand  
19 at this juncture the trustee and SIPC haven't finished  
20 resolving all of the -- or making determinations with regard to  
21 all of the repurchase agreements. So it sort of leaves us in  
22 limbo at this juncture as to timing going out.

23 We would hope that in the interim that we would be  
24 able to at least obtain some limited discovery on the  
25 particular issues so that we could tee this up for a situation



1 where we would have other stipulated facts or position  
2 ourselves for an affidavit on a summary judgment basis. We  
3 don't envision a lot of discovery on this but we would need  
4 some preliminary discovery and hopefully can do that on a  
5 consensual basis without having to burden the Court with any  
6 discovery related litigation.

7 THE COURT: Okay. Well I'm going to ask the trustee a  
8 question that is a more general question that your comment  
9 brings to mind.

10 MR. MCDONALD: Okay.

11 THE COURT: And it's a very basic issue, is it the  
12 trustee's position that in effect the issue has been joined  
13 when a party within the thirty day period objects to the denial  
14 of a claim and that at that point there is a contested matter  
15 for purposes of discovery rights under the bankruptcy rules?

16 MR. KOBAC: I think our position formally is that we  
17 would file, then, a motion to have our position confirmed.  
18 There'd be reply briefs and so forth. That's essentially what  
19 we've worked out with Fifth Third.

20 Having said that, I think there have been discussions  
21 between Mr. McDonald and others in my office about the points  
22 he's raising. And I don't think we're resistant to doing some  
23 limited discovery, either formally or informally for someone in  
24 their position.

25 THE COURT: All I was really asking, and I understand

1 that with an actively represented party that seeks discovery  
2 it's difficult to say no. I was just trying to get an  
3 understanding whether, for a party who was not actively  
4 represented but who objected to a claim determination, if there  
5 was a general rule of thumb that made that a contested matter,  
6 such that without having to come to court to ask, anybody who  
7 wanted to take discovery would be able to do so consistent with  
8 the Bankruptcy Rules.

9 MR. KOBAK: I think, Your Honor, we'd want to think  
10 about that because there are a number of parties and it's very  
11 easy for somebody to serve a deposition notice or something  
12 even if they're not that serious about pursuing the claims. So  
13 we do intend to tee some of these up as quickly as we can to  
14 get the issues raised.

15 THE COURT: Well here's really where I'm going.  
16 Certain discovery may be permissible because you consent to it.  
17 Certain discovery simply may be available as a matter of right  
18 because there is a contested matter, which gives any party in  
19 interest who's involved in that an opportunity to take such  
20 discovery as is relevant to the objection. We're not talking  
21 about 2004 discovery here, we're talking about --

22 MR. KOBAK: Correct.

23 THE COURT: -- contested matter discovery. So my  
24 threshold question is, and you don't have to respond now but I  
25 do have the question, as to whether procedurally we have what

1 amounts to contested matters at this point, 627 separate  
2 contested matters in which there are pending objections with  
3 disputes in which parties, at least in theory, would have  
4 discovery rights.

5 MR. MCDONALD: Preliminary, at least in our view based  
6 on past experience, I would think the contested matter would  
7 begin at the time that we file a motion specifically asking for  
8 the relief that the claim be denied. Because before that it's  
9 always possible that the claimant will convince us to change  
10 their mind, we'll convince the claimant to change their mind.  
11 Perhaps there are some facts that weren't on the books and  
12 records that somebody can show us. So I think -- and I think  
13 that's consistent with the practice in past litigation -- past  
14 liquidations.

15 THE COURT: Okay.

16 MR. MCDONALD: Thank you, Your Honor.

17 UNIDENTIFIED ATTORNEY: Your Honor, if I could be  
18 heard for a moment on that? The Court has set up specific  
19 procedures pursuant to which SIPC and the trustee could  
20 essentially object to claims. And what they have done here is  
21 they have said your customer claim is denied status as a  
22 customer claim. And we have responded to that with a formal  
23 pleading. And we're discussing having a motion for summary  
24 judgment essentially filed here. I don't know how a motion, at  
25 that point, triggers the contested matter for discovery

1 purposes. I think at this point the issue has clearly been  
2 joined from a procedural perspective and that a litigant, at  
3 this point, would be entitled to appropriate discovery.

4 I'm not saying we're going to have a problem here,  
5 they're indicating that they're willing to engage in informal  
6 discovery; I don't know how far that willingness goes. But I  
7 think, clearly from our position, we have the right under the  
8 rules to engage in this discovery.

9 THE COURT: Well, why don't we leave it on this basis,  
10 and I'm not suggesting that you're the test case for all  
11 discovery that's going to apply in the various pending  
12 objections or objections to be filed by the trustee.

13 As it relates to your situation, the trustee has  
14 already indicated a willingness to work cooperatively with you,  
15 so there's really no issue. If it turns out that there is a  
16 discovery dispute, it will not be presented in open court in  
17 this fashion, it will be subjected to the very same discipline  
18 that applies to any discovery dispute in any case pending in  
19 the Southern District of New York. There'll be a meet and  
20 confer obligation, there'll be a request for a conference with  
21 the Court and ultimately motion practice if that's necessary.

22 The more general question that your coming to the  
23 podium raised in my mind, and I don't think we need to resolve  
24 it today, is whether there is, as a matter of law, a discovery  
25 right prior to the trustee's taking the step of filing some

1 kind of formal pleading in the bankruptcy court to obtain  
2 coercive relief as to a party who has objected to a claim  
3 determination made by the trustee. And I suspect that there  
4 are different perspectives on that question. I'm not  
5 suggesting that we have a free-for-all on whether or not  
6 discovery has been triggered by virtue of the response made by  
7 a claimant to the trustee's objection to that claim. I can  
8 understand both sides of that argument. I was simply asking,  
9 in a very, I think, balanced way what the trustee's position  
10 was on it and he told me, through counsel, I don't know yet.  
11 And so I'm going to take that as the equivocal response for the  
12 day.

13 As to your situation, it's not an issue because you're  
14 going to work it out.

15 UNIDENTIFIED ATTORNEY: Thank you, Your Honor.

16 THE COURT: Is there anyone else who wishes to say  
17 anything at this point?

18 (No audible response)

19 THE COURT: Then we're adjourned. Thank you.

20 MR. CAPUTO: Thanks for taking the time, Your Honor.

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C E R T I F I C A T I O N

I, Pnina Eilberg, certify that the foregoing transcript is a  
true and accurate record of the proceedings.

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Pnina Eilberg

AAERT Certified Electronic Transcriber (CET\*\*D-488)

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Date: November 13, 2009